No. 78-1770

In the Supreme Court of the United States

OCTOBER TERM, 1978

TERRY KAYE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Terry Kaye prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The published opinion of the Court of Appeals is appended to this Petition as Appendix A and is cited as United States v. Fred T. Wornock, Terry A. Kaye, and Robert Snow, No. 78-1382, 78-1418, 78-1433.

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit was entered on April 4, 1979. Petitioner's petition for rehearing, timely filed, was denied pursuant to a per curiam order on April 30, 1979. This order is appended to this petition as Appendix B. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1254(1) and Rule 22.2 of the Rules of this Court.

QUESTION PRESENTED

Whether Petitioner can be found guilty of conspiracy to import a controlled substance, to-wit, marijuana, where absent at trial was any proof that Petitioner conspired to import marijuana of the statutorily proscribed variety.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner Kaye, along with two co-defendants, Fred T. Wornock and Robert Snow, were charged with conspiracy to import a Schedule 1 controlled substance, namely marijuana, in violation of 21 U.S.C. Sec. 963 and 952(a). Following a jury trial, Defendants were convicted of this charge, and on March 29, 1978 Petitioner Kaye was sentenced to a term of eighteen months imprisonment to be followed by a special two-year parole term. Subsequently, Petitioner Kaye filed timely notice of appeal and was placed on bond pending disposition thereof.

On April 4, 1979, the United States Court of Appeals for the Seventh Circuit affirmed Petitioner's conviction, and on April 30, 1979, denied Petitioner's Petition for Rehearing.

STATEMENT OF FACTS

Petitioner Kaye, along with two other co-defendants, adopted an agreed statement of facts approved by the District Court and the Government pursuant to Federal Rules of Appellate Procedure, Section 10(d). The agreed facts are as follows:

In March and April, 1976, Defendant Fred Wornock and others agreed to act in concert to smuggle marijuana into the United States from Colombia. Other parties to this agreement included co-defendant Robert Snow, and Petitioner Terry Kaye.

Each of these three persons, Wornock, Snow, and Petitioner Kaye, were alleged by the Government to have made statements and performed acts which were in furtherance of the agreement and during its pendency. Some of these statements and acts were in the Northern District of Illinois.

During March and April, 1976, Raymond Justinic was a Special Agent of the Drug Enforcement Administration; Howard Perrin was a pilot for United Airlines and a friend of Petitioner Kaye. During this period, Justinic and Perrin pretended to join the Wornock-Snow-Petitioner Kaye group and made statements and performed acts which appeared to be in furtherance of the importation agreement.

Justinic pretended to agree to be the pilot who would ferry the marijuana from Colombia to the United States. He was offered in excess of $100,000 for each trip; an airport manager in Illinois was offered $25,000 for each landing if he could insure that the field would be safe; Justinic was given $6,000 as an advance payment of his expenses in connection with surveying the airstrip in Colombia. De-

fedendant Wornock said that he was running the smuggling operation and had been involved in smuggling for the previous nine years. It was agreed that after Justinic completed the contemplated deliveries, he could be included in a new group comprised of Defendants Snow and Wornock which would continue smuggling activities. It was said that high Colombian officials would provide protection when the aircraft was being loaded.

All of the parties discussed the marijuana which was to be imported; no marijuana was imported; none was offered in evidence. At trial was also introduced the second and third editions of Webster's New International Dictionary which are recognized and learned treatises in lexicography and the meaning of words. Each of these treatises contain two definitions of the word "marijuana." In each the first definition is the plant *nicotiana glauca* and the second is the plant *cannabis sativa L.*

REASONS FOR GRANTING THE WRIT

Petitioner may not be found guilty of conspiracy to import a controlled substance, to-wit, marijuana, where absent at trial was any proof of a necessary element of the Government's case, that being that Petitioner conspired to import marijuana of the statutorily proscribed variety.

In criminal law, perhaps no maxim is more frequently voiced than that which holds the criminal statutes are to be strictly construed, and that all doubts and ambiguities are to be resolved in favor of the defendant. *Rewis* v. *United States,* 401 U.S. 808, 91 S.Ct. 1056 (1971); *United States* v. *Campos-Serrano,* 404 U.S. 293, 92 S.Ct. 471 (1971). Accordingly, in a case such as this the Government must bear the burden of proving that Petitioner Kaye was involved in an agreement to violate the law as charged, that being conspiracy to import marijuana of the proscribed and illegal variety. *United States* v. *Rose,* No. 78-1331 (7 Cir., December 20, 1978); *United States* v. *Bright,* 550 F.2d 249 (5 Cir., 1977); *United States* v. *Baxter,* 492 F.2d 150 (9 Cir.), *cert.den.,* 416 U.S. 940 (1974). As the Court of Appeals correctly noted, proof that the object of the agreement to import was cannabis, of the illegal variety as defined by 21 U.S.C. Sec. 952(a), was a necessary element of the Government's case. See *United States* v. *De La Cruz,* 420 F.2d 1093 (7 Cir., 1970). As the Court of Appeals also correctly noted, the importation of *nicotiana glauca,* another variety of marijuana, is not unlawful under this statute.

In the case at bar, no marijuana was ever imported, analyzed or otherwise identified. Thus, the Government at trial, and the Court of Appeals on review, was forced

to contend that Petitioner Kaye must have intended and conspired to import marijuana of the illegal variety, by the mere fact that much secrecy surrounded the conspiracy. Yet, such secrecy is also susceptible of an interpretation of innocence. First and foremost is the fact that such secrecy would be consistent with Petitioner Kaye's intention to import *nicotiana glauca*, the "legal" variety of marijuana, as such importation while not violative of the drug statutes, would probably violate various excise tax statutes. See 26 U.S.C. 5751(a)(2), and 26 U.S.C. 5752(a)(5).

Analogous to the facts of the instant case is a state case out of Florida, *Purifoy* v. *State*, ... Fla. ....., 359 So.2d 446 (1978), in which the Florida Supreme Court considered the Constitutional propriety of placing the burden upon a defendant to establish his innocence where the State failed to prove a necessary element at trial, that being the weight of the cannabis that defendant was alleged to have possessed.

It was defendant's argument in *Purifoy* that the State had the burden of proving that the cannabis that he possessed weighed more than five grams and that having failed at trial to establish that the weight of the cannabis introduced was over five grams, the State failed to prove what was an essential element of the crime. The court in *Purifoy* agreed, noting that:

> "To hold otherwise would not only place an intolerable burden on criminal defendants, but would contravene the fundamental rule that the prosecution must prove every essential element of the crime charged. See, e.g., *Mullaney* v. *Wilbur*, 421 U.S.684, 95 S.Ct. 1881 (1975)."

As well, Petitioner Kaye would note a recent decision of the 8th Circuit Court of Appeals in *United States* v. *Jackson*, 576 F.2d 749 (8 Cir., 1978). In *Jackson, supra*,

the defendants were convicted of conspiracy to transport stolen securities in interstate commerce. On appeal, defendants admitted that while they stole blank stock certificates, such a theft was not of the type proscribed by the statute under which they were charged; that being Title 18, U.S.C., Sections 659 and 2315, as blank stock certificates were not "securities." As such, the defendant's contention in *Jackson, supra*, was similar to that raised by Petitioner Kaye in the instant case, as it is Petitioner Kaye's contention that planning to import marijuana of the non-proscribed variety, was not and could not be conspiracy to import marijuana as defined in Title 21, Sec. 963 and Sec. 952(a).

The Circuit Court of Appeals began its analysis by noting that criminal statutes are to be strictly construed. As there was a variance between the proof adduced at trial, that being the theft of blank stock certificates, and the crime as alleged in the Government's indictment, that being the theft of securities, a crucial element of proof was missing from the Government's case. 576 F.2d at 756. Accordingly, defendants' convictions were reversed.

Similarly, in the case at bar, there was also a variance between the Government's proof at trial and the crime as charged in the Government's indictment. As there was absolutely no evidence introduced that Petitioner Kaye intended to import marijuana of the illegal variety, a crucial element of proof was missing.

CONCLUSION

For all the foregoing reasons, Petitioner prays that the Petition for Writ of Certiorari should be allowed to review the instant decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

SAM ADAM
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Attorneys for Petitioner.

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 78-1382, 78-1418, 78-1433
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRED T. WORNOCK, TERRY A. KAYE, and ROBERT SNOW,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 76-CR-549—John F. Grady, Judge.

ARGUED DECEMBER 8, 1978—DECIDED APRIL 4, 1979

Before SWYGERT, LAY*, and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* The defendants appeal from their convictions of conspiracy to import a schedule I controlled substance, namely marihuana,[1] in violation of 21

* Circuit Judge Donald P. Lay of the Eighth Circuit is sitting by designation.

[1] Although 21 U.S.C. § 802 refers specifically to the plant *cannabis sativa L.*, the definition of the controlled substance involved here apparently comprises all species of cannabis containing tetrahydrocannabinol (THC). *E.g., United States* v. *Walton*, 514 F.2d 201 (D.C. Cir. 1975). We also note the spelling "marihuana" in § 802. Because the parties have used the alternate spelling "marijuana," we will ordinarily use that spelling herein.

U.S.C. §§ 963 and 952(a). In brief, the evidence showed that the defendants Wornock, Kaye, and Snow entered an agreement to smuggle a substance they referred to as "marijuana" from Colombia to the United States. An undercover DEA agent and a pilot for United Air Lines pretended to join in the scheme. An amount of $100,000 was promised to the undercover agent for each time he ferried marijuana from Colombia to the United States. An Illinois airport manager was promised $25,000 for each landing, if he could safeguard the landing from detection.

The defendants Wornock and Snow begin their argument with the candid admission that "[t]he government proved beyond a reasonable doubt that Defendants Wornock and Snow conspired to import marijuana." These defendants, however, argue that their use of the term "marijuana" does not show beyond a reasonable doubt that they conspired to smuggle the controlled substance, "marihuana," described in 21 U.S.C. § 802.[2]

To support this theory, the defendants submitted in evidence at trial the Second and Third Editions of Webster's New International Dictionary. Each dictionary contains two definitions of the word "marijuana." The first definition in each dictionary refers to *nicotiana glauca*, a form of wild tobacco apparently unrelated to any form of cannabis. The second definition refers to the plant *Cannabis sativa*, or the plant which is the source of the drug cannabin. "Marihuana" as defined in 21 U.S.C. § 802 is a controlled substance under the statute. 21 U.S.C. § 812. According to the defendants the Government offered no proof that the defendants

[2] The defendant Kaye also joins in this argument, but does not concede that he joined in the conspiracy. We discuss the proof of Kaye's participation in the conspiracy *infra*.

meant cannabis to be the subject of their smuggling conspiracy. No cannabis was submitted in evidence because none was successfully imported. The defendants also argue that the evidence of furtive behavior does not distinguish this conspiracy from a conspiracy to smuggle wild tobacco, which may be subject to excise tax liability, a crime not charged in the indictment.

We agree with the Government that it need not prove that cannabis in fact was imported. *United States* v. *Rose*, No. 78-1331 (7th Cir., December 20, 1978); *United States* v. *Thompson*, 493 F.2d 305 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974). Thus, the conviction was not improper simply because no cannabis was ever smuggled as the result of the conspiracy. The Government must, however, prove an agreement to violate the law as charged. *United States* v. *Rose*, No. 78-1331 (7th Cir., December 20, 1978); *United States* v. *Bright*, 550 F.2d 249 (5th Cir. 1977); *United States* v. *Baxter*, 492 F.2d 150 (9th Cir.), *cert. denied*, 416 U.S. 940 (1974). Proof that the object of the agreement to import was cannabis, unlawful under 21 U.S.C. § 952(a),[3] was therefore necessary. *See United States* v. *De La Cruz*, 420 F.2d 1093 (7th Cir. 1970).

We hold that the Government proved an agreement to import cannabis in violation of 21 U.S.C. § 952(a). The theory of defense argued here on appeal was argued to the jury, and the court instructed the jury as follows:

> *Nicotiana glauca*, also known as wild tobacco, according to the dictionary in evidence, was not classified as a controlled substance by Congress and an agreement to import it is not a violation of the Federal Controlled Substances Act; namely, the Act that I read to you a few moments ago.

[3] Importing *nicotiana glauca* is not unlawful under this statute.

> According to the dictionaries in evidence, the word marijuana means either: 1) nicotiana glauca, wild tobacco, or 2) cannabis sativa L.
>
> If you have a reasonable doubt that any defendant agreed to import cannabis sativa L., then you must find that defendant not guilty.

The trial court properly let the jury determine whether the possibility that the defendants meant "wild tobacco" by using the term "marijuana" was sufficient to raise a reasonable doubt about the unlawfulness of the purpose of the agreement under 21 U.S.C. § 952(a). From the jury's verdict it is clear it found the defendants' theory incredible.

The defendants argue that their proof of the ambiguity of the term "marijuana" was unrebutted by any evidence referable only to a cannabis importation conspiracy, and that the jury's verdict was therefore without support in the evidence. The defendants' argument fails to recognize, however, that our system of evidence relies on the use of facts outside the record, that is, a general body of knowledge which both judge and jury carry into the courtroom, without which our judicial system could not operate:

> [E]very case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes, from nonevidence sources within himself that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate Cogito, ergo sum.

Advisory Committee's Note, Fed. R. Evid. 201 (quoting Davis, *A System of Judicial Notice Based on Fairness and Convenience, Perspectives of Law* 69, 73 (1964)). *United States* v. *Ricciardi*, 357 F.2d 91, 95-96 (2d Cir.), *cert. denied*, 384 U.S. 942; 385 U.S. 814 (1966); C. Wright & K. Graham, *Federal Practice & Procedure*, § 5103, at 471-72. *See also United States* v. *Griffin*, 525 F.2d 710 (1st Cir. 1975), *cert. denied*, 424 U.S. 945 (1976); *United States* v. *Prochaska*, 222 F.2d 1 (7th Cir.), *cert. denied*, 350 U.S. 836 (1955). The jury brought to this trial at least an ordinary measure of common sense and everyday knowledge, an example of which is that our society customarily uses the term "marijuana" to refer to cannabis, not wild tobacco. Indeed, we venture that it is safe to say that it is unlikely that the wild tobacco definition would be known to anyone who had not resorted to an unabridged dictionary. Thus Webster's New World Dictionary of the American Language, Second College Edition (1963), for example, defines the word as hemp whose dried leaves are smoked, especially in the form of cigarettes for the psychological and euphoric effects. The use of this term alone is therefore substantial and sufficiently probative evidence to support the jury's finding that the object of the conspiracy was the importation of cannabis. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).[4]

The defendant Kaye also argues that the evidence that he agreed to commit the crime of importing cannabis is

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[4] Moreover, the record shows that at least one witness interpreted "marijuana" to mean cannabis, not wild tobacco. Howard Perrin testified that after the defendant Kaye told him of the plan to smuggle "marijuana" his reaction was to call the FBI to inform them of a "drug smuggling business." Although the contents of this conversation were not admitted for their truth, the fact that Perrin made this statement shows his understanding of the meaning of the term used by the defendants.

insufficient to support the jury's guilty verdict. Kaye's theory is that he agreed merely to procure a plane and pilot for the scheme, and that he did not join the main smuggling conspiracy.

This contention is without merit. The evidence was more than sufficient for the jury to find that he was a part of the overall conspiracy. He knew the purpose of the conspiracy and the identity of co-consipators Snow and Wornock. His efforts to assist them in bringing marijuana into the United States from Colombia included approaching Perrin to find a pilot, setting up a meeting between Snow and Perrin and Snow and Justinic, negotiating with Justinic to acquire a plane and crew, offering to pay up to $30,000 per flight to the crew, introducing Justinic to Wornock, and attempting to bribe the manager of the Kankakee Airport to acquire a secured airport for landing the airplane to carry the substantial quantity of marijuana. Indeed, his own admissions demonstrate involvement. Thus, he told Justinic on one occasion that he was part of a smuggling group trying to bring 30,000 pounds of marijuana out of Colombia, and during another conversation he told Justinic that he would have to check with his associate to see if the $56,000 per trip that Justinic was asking for would be approved.

We agree with the Government that Kaye's agreement with and membership in the charged conspiracy is manifest by both his personal efforts and his concert of action with his co-conspirators to accomplish the goal of the conspiracy. His reliance on *United States* v. *Hysohion*, 448 F.2d 343 (2d Cir. 1971), is misplaced. Unlike Rimbaud in that case, Kaye was no "mere casual facilitator." Kaye's argument that he was ignorant of the details of the scheme does not compel a different result. *United States* v. *Cardi*, 478 F.2d 1362 (7th Cir. 1973), *cert. denied*, 414 U.S. 852 & 1001.

Finally, we conclude that the trial court properly refused the defendant Kaye's multiple conspiracy instruction. The indictment contained one conspiracy count, and the instructions given adequately outlined for the jury the elements of the offense, including the requirement that the defendant be a willing and knowing member of the conspiracy charged. Furthermore, the court recited for the jury Kaye's theory that his participation in the plan was limited to procuring the airplane and did not extend to membership in the smuggling conspiracy. Under these circumstances, the multiple conspiracy instruction merely would have confused the jury. *United States* v. *Abraham*, 541 F.2d 1234 (7th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977).

For the above reasons, the judgments of the district court are affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 30, 1979

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. DONALD P. LAY, *Circuit Judge**
Hon. WILBUR F. PELL, JR., *Circuit Judge*

No. 78-1418

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

TERRY A. KAYE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois.
No. 76-CR-549
JOHN F. GRADY, *Judge.*

On consideration of the petition for rehearing filed in the above-entitled cause by Terry A. Kaye, defendant-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Circuit Judge Donald P. Lay of the Eighth Circuit is sitting by designation.